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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH DUFFEY, DIRECTOR,
UNITED STATES INFORMATION AGENCY, PETITIONER

v.

CAROLEE BRADY HARTMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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1. Respondents argue that the court of appeals did not rely on statistical evidence alone in concluding that the class action in this case was properly certified, and that the court of appeals merely applied well-settled standards of review in approving the class certification based on the evidence that the district court had considered. Br. in Opp. 14-15. That argument, however, cannot withstand careful examination of the court of appeals' decision.

The district court did not rely on statistical evidence *at all* when, on the second remand, it concluded that the class was properly certified. See Pet. App. 270a ("The Court of Appeals made clear that this Court cannot rely on trial statistics to support its

decision to certify the class."). Rather, it relied on "anecdotal testimony" introduced at trial (*ibid.*) and also on declarations by the new, post-remand intervenors (*id.* at 271a-272a) to conclude that the prerequisites of commonality and typicality were satisfied. On appeal, petitioner, the Director of the United States Information Agency (USIA), challenged the basis for the district court's class certification, contending that, while the anecdotal evidence relied on by the district court might be probative of individual cases of discrimination, it did not suggest a policy of discrimination common to all class members. See Gov't C.A. Br. 16-21. As the district court did not consider statistical evidence in its certification decision, USIA did not discuss that evidence in the section of its brief challenging certification. Nor did respondents defend the certification decision on appeal based on the statistical evidence as an alternative ground.

The court of appeals assumed *arguendo* that USIA's challenge to the evidence actually relied on by the district court was meritorious—*i.e.*, that the anecdotal evidence was *not* sufficient to support class certification. The court concluded nonetheless that the certification should not be overturned because the *other* evidence in the record—the statistical evidence introduced at trial—was sufficient to support certification, even though the district court had never analyzed or relied on those statistics for the purpose of certification, and had expressly stated that it would not use them for that purpose.[1] After the court of

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[1] The district court had previously certified the class in 1978, without considering statistical evidence at all. Pet. App. 15a-16a. The district court subsequently used statistical evidence to *narrow* the plaintiff class, after finding that women

appeals noted that USIA had argued that the anecdotal evidence relied on by the district court was insufficient, the court of appeals stated that "even if we resolved [USIA's challenge to the anecdotal evidence relied on by the district court] in the defendant's favor we would not find an abuse of discretion in the class certification." Pet. App. 9a. It then explained *why* there would be no abuse of discretion: the statistical evidence never relied on by the district court remained. *Ibid.*

The court of appeals' treatment of this issue cannot be defended as a commonplace application of the abuse-of-discretion standard of review. The court of appeals did not state that it would uphold the district court's decision even though it might have come to a different conclusion about the same evidence, as respondents suggest (Br. in Opp. 14). Rather, the court of appeals upheld the result, the certification, based on evidence that was completely dehors the district court's analysis on that issue.[2] At a minimum, once the court of appeals came to the novel conclusion that the statistical evidence alone might be sufficient to support class certification, it should have remanded the case

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were overrepresented in USIA clerical positions. *Id.* at 25a-26a. As to non-clerical positions, the district court initially found the statistical evidence presented by both sides to be unhelpful. *Id.* at 26a-27a. Thus, at no earlier point in the case did the district court rely on statistical evidence to support its class certification decision.

[2] Thus, this case is unlike either *Wagner* v. *Taylor*, 836 F.2d 578 (D.C. Cir. 1987), or *McCarthy* v. *Kleindienst*, 741 F.2d 1406 (D.C. Cir. 1984), on which respondents reply (Br. in Opp. 14). In those cases, the court of appeals affirmed the denial of class certification by the district court after reviewing the evidence considered by the lower court.

to the district court for analysis of that evidence under the standards of Federal Rule of Civil Procedure 23(a), rather than evaluating that evidence itself, without the benefit of briefing or a lower court decision.[3] See *Hormel* v. *Helvering*, 312 U.S. 552, 556-560 (1941).

Properly read, the court of appeals' decision makes clear that it relied on trial statistics alone to support the certification. The court first noted that, in its previous decision, it had "hesitated to suggest that the certification finding might be based on statistical evidence alone," Pet. App. 9a, and it then explained that it no longer had any such qualms, *ibid.* Respondents suggest that the court of appeals found it proper to rely on the trial statistics to uphold the certification because USIA had not, on its second appeal, specifically challenged those statistics on the ground that they conflated figures for civil-service and foreign-service positions. Br. in Opp. 9. Even if that explanation does partially illuminate the process by which the court of appeals reached its result, it demonstrates that the court of appeals made another,

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[3] Respondents state that USIA "asserts no error with regard to the court of appeals' holding on abuse of discretion." Br. in Opp. 14 n.4. We do not, of course, contest that the appropriate standard of review of class certification decisions is abuse of discretion. Our point, rather, is that the court of appeals never considered whether the district court had abused its discretion based on the evidence that was the predicate for the district court's analysis, because the court of appeals upheld the certification decision on a completely different evidentiary ground. Indeed, the court of appeals was willing to assume that the district court had committed error in basing certification on the evidence that it actually relied on, for it assumed *arguendo* that USIA's challenge to that evidence had merit. Pet. App. 9a.

serious error: the court of appeals failed to give USIA any opportunity to contest the relevance of the statistics to class certification. USIA had not discussed the statistics with respect to the certification decision because those statistics had formed no part of the district court's exercise of its discretion on that issue. In that context, the fact that USIA had not addressed "the civil service/foreign service difficulty" with respect to the statistics (or otherwise) simply cannot be taken as a waiver of any or all claims of error with respect to the use of statistics for class certification. And in any event, USIA's objection to the use of statistics for certification goes well beyond the civil service/foreign service distinction, since our position is that statistics alone cannot demonstrate the commonality and typicality necessary for Rule 23.[4]

2. Respondents argue that the court of appeals correctly ruled that USIA waived its right to contest post-remand intervention by 20 new named plaintiffs and class representatives because USIA had not challenged those plaintiffs' lack of exhaustion of their

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[4] The court of appeals suggested that its prior qualms about the use of statistics were based largely on its concern about the blurring of foreign-service and civil-service positions in the plaintiff class. Pet. App. 9a. Even if that concern did in large part animate the previous panel's concern about statistics, that point hardly leads to the conclusion that it could constitute the *only* possible basis on which USIA might ever challenge the use of statistics to support class certification. The district court faithfully heeded what it took to be the prior panel's directive not to rely on statistics. Had the district court suggested that it might rely on statistics, USIA could have placed all its objections to the use of the statistics in this case on the record and raised those objections on appeal as well.

administrative remedies *before* they moved to intervene. Br. in Opp. 22. Respondents suggest that, even before the prior appeal, USIA knew the names and claims of all class members (*ibid.*), and so (presumably) USIA could have raised some unspecified objection to participation by class members who had not exhausted their remedies, and who had not yet sought to intervene. That suggestion is incorrect.

The names and claims of the intervenors became significant to the conduct of the class action only after the court of appeals' remand for further class-action proceedings. Apparently concerned that the evidence of typicality thus far placed in the record was weak, respondents brought forward new class representatives to bolster their chance of surviving scrutiny under Rule 23(a). If USIA had successfully challenged those class representatives as proper plaintiffs on the ground that they had not exhausted their administrative remedies, USIA would have been better situated to persuade the district court or the court of appeals that the original named representatives' claims were not typical of those of the class as a whole, and that the class should have been decertified.

Under the court of appeals' waiver rule, however, USIA presumably should have examined every unnamed class member's claim at the earliest possible stage to see whether those claims had been exhausted, and should have raised a challenge to every nonexhausted individual's status as a class *member* at that time—because of the remote possibility that, at some later point, any one of those class members might seek to become a class representative and named plaintiff. That holding, if left unreviewed, would be greatly burdensome to both plaintiffs and defendants in class actions; in this case, for example,

there are about 1100 unnamed class member claimants whose records would have to be examined in detail.[5] Nor is such a rule consistent with standard principles of class-action law. The intervenors' suitability as class members is not the same issue as their suitability as class representatives. If the intervenors here failed to exhaust their administrative remedies and have no legally sufficient excuse for that failure, then they are not appropriate class representatives, and USIA should have the right to challenge their intervention as named plaintiffs and representatives, whether or not they might remain as absent members of the class.[6]

Respondents also suggest that USIA's challenge to the intervention is academic because the court of

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[5] Of those 1100 class members, 19 have had their claims reviewed by a Special Master appointed by the district court. The Special Master has issued final reports in 14 of those cases, and has ruled in favor of the claimants in 12 cases. The average back pay award to each successful claimant thus far is approximately $518,000. Appeals from those awards are pending in the district court.

[6] For a variety of reasons, a class-action defendant might not challenge absent class members' status as class *members* based on their failure to exhaust remedies during the liability stage of the litigation. In cases like this one, there might be other members of the class who did exhaust their remedies, or who would be entitled to the benefit of the vicarious exhaustion rule of *Foster* v. *Gueory*, 655 F.2d 1319 (D.C. Cir. 1981), and who therefore were proper class members. Thus, there might be little point in contesting some individuals' membership in the class if numerous other members would remain in the class anyway. The class-action defendant might, however, challenge nonexhausting class members' right to relief at the remedial stage. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324 (1977).

appeals upheld the district court's decision to certify the class even without the evidence brought forward by those intervenors. Br. in Opp. 24. As we have explained, however, we believe that the district court's initial certification of the class action in 1978 was error, and USIA has consistently challenged that certification. The court of appeals did *not* affirm the district court's initial certification decision based on the evidence before the district court in 1978; rather, it affirmed certification based on the statistical evidence. The court of appeals has not yet considered USIA's contention that the district court's basis for the certification in 1978 was erroneous. If, however, this Court reverses the court of appeals' reliance on the statistical evidence to uphold the certification, and if this Court rules that USIA did not waive its right to contest intervention by the new named plaintiffs, then USIA will finally be able to present all of its challenges to the class certification to the court of appeals. USIA will be able to argue, for example, that the evidence before the district court in 1978 was not sufficient to support class certification, that the district court should not have considered the evidence brought forward by the intervenors (since they may not be proper class representatives), and that, even with some or all of the intervenors' additional evidence, class certification was not proper. Thus far, however, the court of appeals has not given USIA a hearing on any of those arguments.

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For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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